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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1491

JOSEPH H. SEYMOUR, *et al.*, etc.,

Petitioners,

vs.

COUGHLIN COMPANY, a California corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Petitioners, the joint labor-management boards of trustees of the Operating Engineers Trusts (''Trustees''), file this reply brief to address an argument first raised in the respondent Coughlin Company's (''Coughlin'') brief in opposition to the petition.

Coughlin contends that §8(d) of the National Labor Relations Act [29 U.S.C. §158(d)] cannot be considered in the context of a §301(a) suit to enforce a collective bargaining agreement, because §8(d) involves ''whether an unfair labor practice has occurred'' and can be considered only in proceedings before the National Labor Relations Board. (Op. Br., pp. 8-13).

The Trustees do not seek a holding that an unfair labor practice has occurred or a remedy for such a statutory vi-

olation.[1] The petition seeks an interpretation of the collective bargaining agreement "in the light of the law relating to it when made." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 279, 76 S.Ct. 349, 356 (1956). This Court has held that the substantive rules of contract interpretation to be applied in suits for enforcement of collective bargaining agreements under §301(a) are federal law "which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456, 77 S.Ct. 912, 918 (1957). The *Textile Workers* decision of this Court further described the source of federal substantive law in §301(a) cases as follows:

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.*, 353 U.S. at 457, 77 S.Ct. at 918.

Section 8(d) is a part of "the penumbra of express statutory mandates" to be considered in fashioning the rules of contract interpretation that will best effectuate the federal policy.

The court of appeals in *International Union of Operating Engineers, Local No. 181 v. Dahlem Construction Company*, 193 F.2d 470 (6th Cir. 1951), cited by Coughlin, actually did examine the provisions and policy of §8(d). The Sixth Circuit held first (193 F.2d at 473) that the union's efforts to terminate the collective bargaining agreement had not complied with the requirements of §8(d), and second

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[1]Section 8(d) does not specify or prohibit an unfair labor practice. Unfair labor practices are set forth in §158(a), (b) and (e).

(193 F.2d at 474-75) that the collective bargaining agreement remained in full force and effect because the union's proposed interpretation of the agreement "would distort the express terms of the statute [§8(d)] and run counter to several decisions construing it."

Coughlin also cites the case of *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), a case in which the Trustees of the Operating Engineers Trusts were appellants and the prevailing parties on appeal. In *McGray*, the employers sought to defend against enforcement of the collective bargaining agreement by asserting that a particular clause of the agreement violated the unfair labor practice provisions of §8(e) of the Act and by requesting that the district court declare the clause to be null and void. The court of appeals held that the alleged violation of §8(e) was within the exclusive primary jurisdiction of the National Labor Relations Board, and that federal district courts should proceed in §301(a) suits to enforce the contract rights of parties without reference to unfair labor practice defenses. The holding of the court of appeals in *McGray* is consistent with and required by the previous decisions of this Court in *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161 (1953); *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267 (1962); and *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909 (1971). The *McGray* decision and the previous decisions of this Court support, rather than detract from, the jurisdiction of federal courts to proceed with adjudication of suits under §301(a). Such suits require application of federal rules of interpretation, including the rule that collective bargaining agreements will be interpreted "as a whole and in the light of the law relating to it when made", and such additional rules of interpretation

as are necessarily fashioned from the penumbra of federal labor statutory mandates.

The aim of §8(d) is "to bring about the termination and modification of collective bargaining agreements without interrupting the flow of commerce or the production of goods. . . ." *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Company*, 404 U.S. 157, 187, 92 S.Ct. 383, 402 (1971). The court of appeals refused to consider this legislative aim, and refused to consider the uncontroverted extrinsic evidence that Local 12 and Coughlin intended the short form agreement to remain in effect with the incorporated terms of the modified Master Labor Agreement. The court of appeals applied a rule of law disfavoring such an interpretation and causing automatic termination of the agreement, contrary to the express provisions of §8(d), in order to protect Coughlin from being bound to the modified Master Labor Agreement because "he [Coughlin] had no part in negotiations for that new agreement". (*Pet.App.* A, p. 6.)[2] That rule of contract interpretation is importantly erroneous, as was the granting of summary judgment against the Trustees despite the uncontroverted extrinsic evidence of contractual intent. The opposing brief makes no reference to the extrinsic evidence of contractual intent or to the propriety of summary judgment in light of that evidence.

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[2]Thousands of employers regularly bind themselves to prospective collective bargaining agreements under circumstances in which the individual employer will have no direct participation in the negotiations and little or no control over the final terms of agreement. See, e.g., *Bonanno Linen Service, Inc.* (*Teamsters Local 25*), 243 NLRB No. 140, 102 LRRM 1001 (1979). From Coughlin's point of view, the short form agreement accomplished substantially the same purpose and Coughlin avoided the cost of paying membership dues in an employer association.

Conclusion.

The petition for a writ of certiorari should be granted.

May, 1980.

Respectfully submitted,

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Counsel for Petitioners.